## APPENDIX

IN THE SUPREME COURT OF THE
STATE OF NEVADA

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No. 18516

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HARRIETTE TURNBOW,

*Appellant,*

v.

PACIFIC MUTUAL LIFE INSURANCE COMPANY, a California Corporation; PENSION ADMINISTRATION, INC., a California Corporation; JOHN F. MCGOWAN, Individually, DONALD R. LAWRENZ, Individually and as Trustee for Beneficial Employees Security Trust; BENEFICIAL EMPLOYEES SECURITY TRUST,

*Respondents.*

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December 21, 1988

Appeal from an order granting respondents summary judgment. First Judicial District Court, Carson City; Michael R. Griffin, Judge.

Reversed.

*Riley Beckett* and *Carl F. Martillaro*, Carson City, for Appellant.

*Hawkins & Sharp* and *Keegan G. Low*, Reno, for Respondents.

OPINION

*Per Curiam:*

On November 1, 1974, appellant, Harriette Turnbow, dba The Bottle Stop, subscribed to respondent Beneficial Employees Security Trust (BEST). Appellant is the sole

owner of "The Bottle Stop," a liquor store in Yerington. BEST is a multi-employer trust (MET), underwritten by respondent Pacific Mutual Insurance Company. A MET is a trust created to pool small employers together to permit them to obtain lower insurance rates.

By subscribing to BEST appellant was able to obtain major medical insurance benefits up to $1,000,000. Appellant paid the premiums through The Bottle Stop. The policy provided coverage for appellant and three full-time employees of The Bottle Stop.

In August, 1981, appellant suffered a stroke. Appellant received benefits under the policy. However, by May of 1983 the monthly premium had risen to $1,256.00. Appellant could no longer afford the premium payments and lost her benefits under the policy.

On July 15, 1985, appellant filed suit in the First Judicial District Court. Appellant sought insurance proceeds and damages under several different theories including: breach of contract, bad faith, breach of the insurance companies' obligations under NRS 686A.010 *et seq.*, infliction of emotional distress and punitive damages. Respondents removed the suit to federal district court. Subsequently, the case was remanded back to the First Judicial District Court.

Respondents moved to dismiss the action. Respondents asserted that appellant had created an ERISA plan and that appellant's causes of action were therefore preempted by federal law.[1] Appellant opposed the motion contending that she had not created an ERISA plan. The district court treated the motion to dismiss as a motion for summary judgment. The district court granted respondents' motion finding that appellant had created an ERISA plan and that federal law preempted her causes of action under state law. This appeal followed.

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[1] Employees Retirement Income Security Act of 1974, U.S.C. §§ 1001 *et seq.*

Appellant contends that the district court erred in granting respondents summary judgment. Specifically, appellant contends that the district court erred in determining that she had created an ERISA plan.

There are two leading cases on the issue of whether an employer can create an ERISA plan merely by purchasing health insurance benefits for employees. One is Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982) and the other is Taggart Corp. v. Life and Health Benefits Administration, Inc., 617 F.2d 1208 (5th Cir. 1980). Both cases indicate that more is involved in creating an ERISA plan than the mere purchase of health insurance benefits for employees by an employer.

The court in *Dillingham* held that employers who subscribed to METS pursuant to collective bargaining agreements or pursuant to a continuing practice of purchasing insurance for a class of employees had established employee welfare plans. *Dillingham*, 688 F.2d at 1374. The *Dillingham* court also held that those employers subscribing to a MET, although not pursuant to collective bargaining agreements or a practice of providing insurance benefits, also established employee welfare plans if circumstances showed an anticipated continued furnishing of the benefits. *Dillingham*, 688 F.2d at 1374, 1375. Thus, *Dillingham* requires, in addition to the employer purchasing health insurance benefits for employees, that circumstances indicate the employer is committed to the continuation of health insurance benefits for employees.

The *Taggart* court held that an employer did not establish an ERISA plan by subscribing to a MET. *Taggart*, 617 F.2d at 1211. The *Taggart* court stated: "[W]e cannot believe that [ERISA] regulates bare purchases of health insurance where, as here, the purchasing employer neither directly nor indirectly owns, controls, administers or assumes responsibility for the policy or its benefits." *Taggart*, 617 F.2d at 1211. The *Taggart* court reasoned that ERISA had been created to protect the

assets of employee benefit plans and that because there were no assets and the employer was not liable for benefits no plan existed. *Taggart*, 617 F.2d at 1211. Thus, *Taggart* also requires, in addition to the employer purchasing health insurance benefits for employees, that some indication exists showing the employer intended to guarantee the continuation of health insurance benefits for employees.

We conclude that the district court erred in finding that appellant had created an ERISA plan. Appellant did not create an ERISA plan. Unless there is some indication that an employer is committed to or has guaranteed the continuation of such benefits, nothing is created for ERISA to protect and no plan exists. Appellant did not purchase the health insurance for her employees pursuant to a collective bargaining agreement or a practice of providing such benefits. Nor is there any indication that appellant intended to guarantee the continued furnishing of the benefits. ERISA dos not regulate the bare purchases of health insurance where, as here, there is no indication that the employer intended to guarantee the continued furnishing of the benefits.

Appellant also contends that the district court erred in determining that her state common law claims were preempted by ERISA. The United States Supreme Court has held that when an ERISA plan exists state common law remedies are preempted by the remedies provided under ERISA. Pilot Life Insurance Co. v. Dedeaux, 481 U.S. ——, 107 S.Ct. 1549 (1987). As we stated above, appellant did not create an ERISA plan. Therefore, her state common law remedies were not preempted and the district court erred in determining that they were.

Furthermore, appellant does not qualify as a participant or beneficiary in an ERISA plan within the meaning of ERISA and therefore may seek relief under our state common law.

> In order for an individual to bring an action to recover benefits owed under an ERISA plan, the individual must be a "participant" or "beneficiary" of the plan. *See* 29 U.S.C. § 1132(a)(1)(B). Conversely, if [appellant] is not a "participant" or "beneficiary," [she] may sue under and seek the broader relief provided by state tort law, and the case must be remanded to state court to permit [her] to do so.

Dodd v. John Hancock Mut. Life Ins. Co., 688 F.Supp. 564, 568 (E.D.Cal. 1988). Appellant was a participant or beneficiary in an ERISA plan only if she was an employee. *Dodd*, 688 F.Supp. at 569.

*Dodd* held that "an owner of a corporation who is also an employee of the corporation shall be treated as an employee for purposes of determining whether the owner is a participant in such a plan within the meaning of ERISA." *Dodd*, 688 F.Supp. at 571. The *Dodd* court reasoned that when self-employed individuals incorporate the corporation becomes the employer and the most natural reading of the statute includes all corporate employees as employees under an ERISA plan. In this case, appellant was self-employed. Her business, The Bottle Stop, was not incorporated and therefore could not be considered appellant's employer. Thus, even if appellant could be viewed as having created an ERISA plan, she was not an employee and is entitled to seek relief in state court. Accordingly, we reverse and remand this case to the district court so that appellant may proceed to trial on all her causes of action.[2]

YOUNG, A. C. J.
STEFFEN, J.
SPRINGER, J.
MOWBRAY, J.

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[2] THE HONORABLE E. M. GUNDERSON, Chief Justice, did not participate in the decision of this appeal.

IN THE FIRST JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

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Case No. 85-01107A

Dept. No. 1

HARRIETTE TURNBOW,
*Plaintiff,*

v.

PACIFIC MUTUAL LIFE INSURANCE COMPANY, a California corporation; BENEFICIAL ADMINISTRATION COMPANY, a California corporation; PENSION ADMINISTRATION, INC., a California corporation, DONALD R. LAWRENZ, individually and as TRUSTEE for BENEFICIAL EMPLOYEES SECURITY TRUST, BENEFICIAL EMPLOYEES SECURITY TRUST, and DOES I THROUGH L, inclusive,
*Defendants.*

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## ORDER GRANTING SUMMARY JUDGMENT

The issue before the court is whether the Plaintiff created an ERISA plan when she procured insurance for herself, her daughter, and her employees of The Bottle Stop.

In order to have an ERISA plan, several elements must be present:

1. The employer must endorse the insurance program, not merely advertise;
2. The employer must make contributions;
3. The employees must participate automatically in the plan provided they meet the requirements for the program;

4. The employer must receive consideration in connection with the program over and above a fee for its administrative expenses actually rendered in connection with payroll deductions or dues checkoffs. 29 C.F.R. Sec. 2510.3-1(j).

In the present situation, Plaintiff procured insurance under the name "The Bottle Stop" for herself, her daughter, and her full-time employees. Therefore, she did not merely advertise the insurance program.

Additionally, The Bottle Stop paid the premiums for the employee insurance through the company account. There was no evidence presented showing any employee contribution towards the payment of those premiums.

Also, The Bottle Stop, through its owner, procured the insurance for the benefit of all its full-time employees. Participation of those employees was automatic.

Conclusively, the Plaintiff established an ERISA plan knowingly or unknowingly.

Federal law will preempt any State Court action based upon the causes of action stated.

THEREFORE, it is ordered that the Motion for Summary Judgment is granted without prejudice.

DONE this 11th day of AUGUST, 1987.

/s/ Michael R. Griffin
District Judge

IN THE FIRST JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

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Case No. 85-01107A

HARRIETTE TURNBOW,
*Plaintiff,*

v.

PACIFIC MUTUAL LIFE INSURANCE COMPANY, a California corporation; BENEFICIAL ADMINISTRATION COMPANY, a California corporation; PENSION ADMINISTRATORS, INC., a California corporation; JOHN F. MCGOWAN, individually; DONALD R. LAWRENZ, individually and as TRUSTEE for BENEFICIAL EMPLOYEES SECURITY TRUST; BENEFICIAL EMPLOYEES SECURITY TRUST; and DOES I THROUGH L, inclusive, *Defendants.*

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ORDER

The court having reviewed Plaintiff's Motion for Reconsideration and for Leave to Amend and the Opposition thereto and good cause appearing:

IT IS HEREBY ORDERED that the Plaintiff's Motion for Reconsideration is denied. Plaintiff's Alternate Motion for Leave to Amend is also denied.

Moving Defendant's request that this Court's Order granting Summary Judgment, dated August 11, 1987, be amended and clarified, nunc pro tunc, is hereby granted and that Order is therefore amended at line 21, page 1 to add the words "one of" so that the sentence in question shall hereafter read "In order to have an ERISA plan, one of several elements must be present:".

Dated this 14th day of September, 1987.

/s/ Michael R. Griffin
District Court Judge

## STATUTORY PROVISIONS

Employee Retirement Income Security Act of 1974, as amended.

1. Sections 3(1), (7) and (8), 29 U.S.C. §§ 1002(1), (7) and (8). Definitions.

§ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

* * * *

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an em-

ployee benefit plan, who is or may become entitled to a benefit thereunder.

2. Section 502(a), 29 U.S.C. § 1132(a). Civil Enforcement.

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

3. Section 505, 29 U.S.C. § 1135. Regulations.

§ 1135. Regulations

Subject to subchapter II of this chapter and section 1029 of this title, the Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter. Among other things, such regulations may define accounting, technical and trade terms used in such provisions; may prescribe forms; and may provide for the keeping of books and records, and for the inspection of such books and records (subject to section 1134(a) and (b) of this title).

4. Section 514(a), 29 U.S.C. § 1144a. Effect on other laws.

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Regulations promulgated under Section 503 of ERISA, 29 U.S.C. 1133

1. 29 C.F.R. § 2510.3-1(j) (1987).

(j) *Certain group or group-type insurance programs.* For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include a group or group-type insurance pro-

gram offered by an insurer to employees or members of an employee organization, under which

(1) No contributions are made by an employer or employee organization;

(2) Participation in the program is completely voluntary for employees or members;

(3) The sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer; and

(4) The employer or employee organization receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions or dues checkoffs.

2. 29 C.F.R. § 2560.503-1(g)(2) (1987).

(2) To the extent that benefits under an employee benefit plan are provided or administered by an insurance company, insurance service, or other similar organization which is subject to regulation under the insurance laws of one or more States, the claims procedure pertaining to such benefits may provide for review of and decision upon denied claims by such company, service or organization. In such case, that company, service, or organization shall be the "appropriate named fiduciary" for purposes of this section. In all other cases, the "appropriate named fiduciary" for purposes of this section may be the plan administrator or any other person designated by the plan, provided that such plan administrator or other person is either named in the plan instrument or is identified pursuant to a procedure set forth in the plan as the person who reviews and makes decisions on claim denials.